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In The

Supreme Court of the United States

October Term, 1994

MINNESOTA COMMISSIONER OF REVENUE AND THE STATE OF MINNESOTA,

Petitioners,

v.

NORWEST BANK DULUTH, N.A.,

Respondents.

MINNESOTA COMMISSIONER OF REVENUE,

Petitioner,

v.

CAMBRIDGE STATE BANK, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

PETITIONERS' REPLY BRIEF

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Petitioners respectfully submit this Reply Brief in response to the Brief in Opposition filed by respondents.

I. THERE WAS NO INDEPENDENT AND ADEQUATE STATE LAW GROUND FOR THE DECISION OF THE MINNESOTA SUPREME COURT, WHICH ERRONEOUSLY CONCLUDED IT WAS COMPELLED BY *HARPER* TO REVERSE ITS PRIOR DECISIONS.

In their brief in opposition (hereinafter "Resp. Br."), respondent banks argue that the petition for writ of certiorari should be denied because the decision of the Minnesota Supreme Court rests on an independent and adequate state law ground. This is incorrect. In fact, only one justice of the Minnesota court would have based an award of refunds on the state law ground cited by respondents, a view that he expressed in a special concurrence. (Pet. App. 17). The majority opinion was based solely on the Minnesota court's erroneous reading of this Court's decisions in *Harper v. Virginia Dept. of Taxation*, 113 S. Ct. 2510 (1993) and *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1980).

In its two previous decisions in this case (reproduced at Pet. App. 19 and Pet. App. 37), the Minnesota Supreme Court held that under Minnesota law, respondent banks were not entitled to refunds of corporate franchise taxes paid. After this Court's remand for reconsideration in light of *Harper*, the Minnesota court stated that, given *Harper's* clarification that *McKesson* directly controls this case, the court was required carefully to reconsider whether a predeprivation remedy which satisfies *McKesson's* requirements existed in Minnesota at the time the taxes were paid by respondent banks. (Pet. App. 11). In doing so, the court concluded that jurisdictional uncertainties called into question the adequacy of an administrative tax court proceeding as predeprivation remedy. The Minnesota court's decision thus centered on its apparent belief that due process is not satisfied if any

doubt can be raised regarding the scope of a prepayment procedure.

Having concluded on this basis that Minnesota did not provide a meaningful predeprivation remedy in 1980 (the year the taxes due for the 1979 test year would have been paid), the court stated that "*McKesson* commands that we design a clear and certain remedy which creates in hindsight a nondiscriminatory scheme." (Pet. App. 15). The court then stated that it had three options, again citing *McKesson*: a refund of taxes paid, a retroactive tax on exempted income, or a combination of the two. The court chose refunds, not because state law required refunds, but because of "possible difficulties inherent in collecting a retroactive tax" and concerns with regard to the constitutionality of such a tax. (Pet. App. 16).

Thus, contrary to respondents' first argument for denial of certiorari, the Minnesota court did not hold that refunds are required under state law, nor did it base its award of refunds on state law grounds.[1] As the decision makes clear, the Minnesota court viewed its decision, both as to the "meaningfulness" of the predeprivation tax court proceeding, and as to the postdeprivation relief, as dictated by *McKesson* in light of *Harper*.[2]

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[1] Respondents cite *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 332 N.W.2d 914 (Minn. 1983) and *Yurista v. Commissioner of Revenue*, 460 N.W.2d 24 (Minn. 1990) for the proposition that the Minnesota court has construed the refund statutes as requiring refunds of unconstitutional taxes. Neither case addressed this issue, since no other remedy was being proposed to or considered by the court, which merely affirmed without comment the lower court's award of refunds.

[2] While the Minnesota court did state that the existence of a tax refund statute provided "further support" for its decision (Pet. App. 14), the court did not hold that the Minnesota refund statute *required* that refunds be paid. If that were the case, the court would have so held in its earliest decision in this case.

That the Minnesota court did not base its decision on state law is clearly demonstrated by the concurring opinion of Justice Page. Pet. App. 17. He would have reached the same result as the majority by basing an award of refunds solely on the refund statute. If, as respondent banks argue, the court had already so held, Justice Page would hardly have bothered to write a special concurrence stating his view as to the appropriate basis for the decision.[3]

Nor did the Minnesota Supreme Court state that it intended to go beyond minimum federal due process requirements by ordering refunds even if it was not compelled to do so. Respondents incorrectly state that the Minnesota court concluded they were entitled to refunds even if there was a predeprivation remedy available. (Resp. Br. 6). In support of this statement, respondents misleadingly quote a sentence from the decision which begins "[e]ven if there was a predeprivation remedy in 1980," but which goes on to conclude, not that the banks were entitled to a refund, as respondents imply, but that they did not know they were foreclosing their right to recover a refund by failing to file a tax court action. (Pet. App. 14-15). In fact there is no independent and adequate state law ground for the decision, which is exclusively

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[3] A holding that Minnesota law requires refunds would have required the court to overrule or distinguish its own decision in *Johnson Brothers Wholesale Liquor Co. v. Commissioner of Revenue*, 402 N.W.2d 791 (Minn. 1987). In that case, the court severed a discriminatory wine tax provision found to violate the Commerce Clause under *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and imposed a compensating tax on the favored local wine producers. In light of the severance remedy, the court held that the plaintiff in *Johnson Brothers* was not entitled to refunds. The court cited *Johnson Brothers* with approval in support of its severance holding in its first decision in this case. Pet. App. 47.

based on the court's flawed analysis of Minnesota's predeprivation procedures in light of its reading of *McKesson* and *Harper*.[4]

II. RESPONDENT BANKS FAILED TO AVAIL THEMSELVES OF MEANINGFUL PREDEPRIVATION PROCEDURES AVAILABLE TO THEM UNDER MINNESOTA LAW.

Respondents assert that there is "absolutely no question" that the Minnesota court was correct in holding that respondent banks did not have a meaningful remedy in a predeprivation tax court proceeding. Resp. Br. 12. In doing so, respondents ignore the troubling issue raised by the Minnesota decision, which rests upon the erroneous assumption that any risk or uncertainty in state predeprivation procedures may render them inadequate to meet minimum federal due process requirements. That issue is, what type of predeprivation process is required for a state to be able to extinguish any postdeprivation obligation to refund taxes?[5]

Nothing in the statutory tax court scheme applicable to respondents in 1980 implied that the banks could not

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[4] Respondents suggest that there is no reason to defer decision on the petition because the issue of a taxpayer's reliance upon a state refund statute is not presented in *Reich v. Collins*, 437 S.E.2d 320 (Ga. 1993), *cert. granted*, 114 S. Ct. 1048 (1994) (Resp. Br. 11). Yet respondents themselves assert that they paid the taxes in question under duress because of various post-assessment penalty, lien and levy provisions in Minnesota law. (Resp. Br. at 16 n.14). The issue of duress has also been raised on similar grounds in *Reich*, further demonstrating why a decision on certiorari should be deferred until a decision in that case.

[5] Petitioners have never argued that respondents "should have litigated in the Tax Court rather than the district court" as respondents claim. Resp. Br. at 5 n.5. The argument has always been that, having failed to avail themselves of a meaningful predeprivation process, petitioners are not constitutionally entitled to refunds as a postdeprivation remedy.

have litigated their constitutional claims either in tax court or in subsequent judicial review of any tax court decision. *See* Minn. Stat. § 271.01 (1978), *et seq.* Pet. App. 99-102. The Minnesota court's decision is based on the fact that questions had been raised as to the tax court's authority to decide constitutional issues. Yet as respondents acknowledge, there was nothing new about such questions. For example, in *Dependents of Ondler v. Peace Officers Benefit Fund*, 289 N.W.2d 486, 487 n.1 (Minn. 1980), the court, reviewing the decision of an administrative tribunal, stated, "adjudication of the constitutionality of legislative enactments has generally been thought beyond the jurisdiction of administrative agencies. This court, however, has the power and affirmative duty to consider constitutional challenges to legislative enactments. . . . " (citations omitted). Whatever questions may have been raised regarding the jurisdiction of administrative tribunals, the Minnesota Supreme Court has never refused to decide constitutional issues raised on judicial review of the decisions of the tax court or other administrative bodies.

No trap was therefore laid for unwary taxpayers, as in *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930). In that case, the Missouri Supreme Court, overruling an earlier decision that a state tax commission had no authority to grant equitable relief on constitutional claims, refused to hear the claims of a taxpayer which had bypassed the tax commission in reliance on the earlier decision. In contrast, the Minnesota Supreme Court has never refused to consider a constitutional claim raised by a taxpayer in a tax court proceeding.

Nothing in this Court's procedural due process decisions suggests that the kind of "uncertainty" involved in this case renders an otherwise comprehensive predeprivation process not meaningful. Certiorari should therefore be granted to clarify whether the due process

standard in tax cases requires the heightened degree of procedural certainty the Minnesota decision adopted.[6]

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE MINNESOTA SUPREME COURT WRONGLY CONCLUDED THAT *HARPER* PREVENTED IT FROM APPLYING A STATE LAW BAR TO RECOVERY OF REFUNDS.

The Minnesota Supreme Court concluded that it was prevented by federal due process principles from applying state law procedural bars to postdeprivation refund claims. The court stated: "*If* there was a meaningful predeprivation procedure in Minnesota at the time the tax was paid, *then* we have the option of denying backward-looking relief *and state law bars to relief may come into play.*" Pet. App. 9 (emphasis added). However, no holding in *McKesson* or *Harper* suggests that lack of a meaningful predeprivation process precludes states from imposing reasonable procedural requirements on postdeprivation

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[6] Respondents downplay the efficacy of the other available predeprivation administrative appeal and declaratory judgment remedies (Resp. Br. at 14 n.13). Their arguments are flawed. In fact, the Minnesota Supreme Court has never prohibited declaratory judgment actions in facial constitutional cases. *See Baertsch v. Minnesota Dept. of Revenue*, 518 N.W.2d 21 (Minn. 1994). Nor has it ever held that the courts of this state have no jurisdiction to decide constitutional issues on review of administrative agency decisions, even if the agency itself has no authority to declare a statute unconstitutional. *Dependents of Ondler*, 289 N.W.2d at 487, clearly states otherwise. As this Court has stated, "[I]t is sufficient . . . that constitutional claims may be raised in state-court judicial review of the administrative proceeding." *Ohio Civil Rights Comm'n v. Dayton Schools*, 477 U.S. 619, 629 (1986) (citations omitted). Thus, an agency's lack of authority to "declare" statutes unconstitutional is irrelevant to the adequacy of a predeprivation process which includes judicial review of agency decisions, as Minnesota tax appeal procedures unquestionably do.

remedies. Indeed, this Court's statements in those cases are all to the contrary. In *McKesson*, the Court referred to "[a] state's freedom to impose various procedural requirements on actions for postdeprivation relief," such as the right to "enforce relatively short statutes of limitation applicable to such actions." *McKesson*, 496 U.S. at 45. *See also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991) ("Nothing we say here deprives [the state] of [its] opportunity to raise procedural bars to recovery under state law").

In its first two decisions in this case, the Minnesota Supreme Court imposed, as one such bar to recovery of refunds, a state law estoppel doctrine. Pet. App. 26, 45-46. The court stated: "We think this court's estoppel holding is one such state procedural bar." Pet. App. 26.[7] Yet, in its most recent decision, the Minnesota court mistakenly concluded that after *Harper*, it could no longer deny a retroactive remedy on *any* state law theory in the absence of a meaningful predeprivation remedy. This is clearly an incorrect reading of this court's due process decisions.[8]

Respondents attempt to minimize this error by arguing that: (1) the Minnesota Supreme Court mislabeled estoppel as a procedural bar, when it is really a substantive rule; (2) by inference, the court changed its mind as to estoppel because it "affirmed the trial court without explicitly discussing the estoppel issue" (Resp. Br. 17); and (3) in any event, the court was under no *obligation* to apply estoppel, so long as minimum federal due process requirements were satisfied. These arguments merely beg

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[7] As discussed in detail in the petition at 27-29, such estoppel doctrines have frequently been applied by both state and federal courts over the years.

[8] The Minnesota court's confusion may have resulted in part from its mistaken belief that the parties had agreed that the existence of a meaningful predeprivation process is a necessary precondition to denying a retroactive remedy on any state law theory. Pet. App. 9. There was no such agreement. *See* Petition at 8 n.5.

the issue raised by the Minnesota court's incorrect holding – whether this Court's due process holding in *Harper* prevents a state from raising procedural bars to actions for refunds when its predeprivation process is uncertain. Certiorari should be granted to resolve that issue.

Whether estoppel is characterized as a "procedural" or "substantive" doctrine is irrelevant. The effect of a finding of estoppel is the same as a finding that a taxpayer has not complied with applicable statutes of limitation or repose – it bars the taxpayer from litigating certain claims. Nothing in this Court's decisions indicates that such state law doctrines as res judicata, waiver, laches or estoppel must be treated differently from statutes of limitation or repose for due process purposes. Respondents' suggestion to the contrary is specious.

Second, there is no indication that the Minnesota court decided as a matter of state law not to apply the estoppel doctrine, having twice before applied it on the same facts. The court clearly believed that it was prohibited under *Harper* from again barring recovery of refunds on estoppel or any other state law theory. Having decided that a postdeprivation remedy was required, the court merely affirmed the trial court's conclusion that the respondent banks are entitled to refunds: "We affirm the trial court's order *from the remedial phase of the trial,* including the court's conclusions as to all expense deductions at issue and the entitlement to interest." (Pet. App. 16-17) (emphasis added).[9] There was simply no reason for the Minnesota Supreme Court to discuss further the lower court's estoppel holding, in light of its conclusion

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[9] The trial court's estoppel holding (that the banks were not estopped from bringing the refund claims) was included in its order from the liability phase of the trial (Pet. App. 66), not the order from the remedial phase. The Minnesota Supreme Court's express affirmance of the trial court's refund order cannot reasonably be read as supporting an inference that it was also affirming an estoppel holding in a different order.

that, after *Harper,* it could not bar postdeprivation relief on such state law grounds as estoppel.

Finally, there is nothing in its decision that indicates the Minnesota Supreme Court intended to go beyond minimum federal due process requirements and order refunds even if it was not required to do so. Respondents' suggestion to the contrary is absurd. The Minnesota court clearly believed that it was constrained by this Court's decision in *Harper* to reconsider its earlier holding that Minnesota afforded taxpayers a meaningful predeprivation process in the form of a tax court proceeding. Having concluded that a meaningful procedure was not available because of jurisdictional uncertainties, the court further concluded that it was constrained to create in hindsight a clear and certain postdeprivation remedy, and that it could not deny such a remedy on any state law theory.

Thus, no reasonable reading of the Minnesota court's decision can lead to any conclusion but that the court was doing what it believed it was required to do under this Court's decision in *Harper.* Nowhere in its decision did the Minnesota court express any intention to provide relief beyond the demands of federal due process. Had it wished to do so, the court could easily have awarded refunds in either of its two earlier decisions in this case. It is therefore irrelevant to argue, as do respondents, that the federal constitution *allows* the State of Minnesota to refund voluntarily paid taxes. Of course it does. The question presented by the decision in this case is whether the federal constitution *requires* the states to refund such taxes. Certiorari should be granted in order to resolve that issue.

CONCLUSION

For the reasons set forth above and in the Petition for Writ of Certiorari, petitioners request that their petition be granted.

Respectfully submitted,

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